Supreme Court, U.S.
FILED

97 1033 DEC 15 1997

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

3 1 PP

QUESTIONS PRESENTED FOR REVIEW

Whether the Tenth Circuit has arbitrarily deprived Mr. Smith of his statutory right to appeal and receive a full and fair review of Judge Nottingham's final orders imposing harsh and unjustified sanctions of approximately $25,000.00 against him, in violation of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law.

Whether these final orders have resulted in irreparable harm to Mr. Smith, who has been suspended from the practice of law since November 29, 1993, pending payment of more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado, including those imposed against him by Judge Nottingham.

Whether since Mr. Smith is financially unable to pay these sanctions, he is being indefinitely excluded from the practice of law on an impermissible basis, i.e., on the basis of his inability to pay harsh and unjustified sanctions of more than $50,000.00, in violation of his Fifth Amendment due process and equal protection rights.

Whether since the unpublished sanction orders issued by Judge Nottingham are not judicial precedents under 10th Cir. R. 36.3., the Tenth Circuit's reliance on this Court's opinion in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) to attempt to justify its issuance of unpublished orders and judgments refusing to vacate Judge Nottingham's unpublished sanction orders was clearly erroneous and contrary to law.

Whether this was especially true considering the devastating impact on Mr. Smith of the Tenth Circuit's refusal to vacate Judge Nottingham's unpublished sanction orders.

Whether under all the circumstances, the Tenth Circuit's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit was obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct.

Whether by failing or refusing to disqualify itself from this case, the Tenth Circuit has deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether the Tenth Circuit has also so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's supervisory power; has decided important questions of federal law that have not been, but should be, settled by this Court; and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

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CITATIONS OF OPINIONS AND ORDERS

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Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92 N 243 (U.S. District Judge Edward W. Nottingham) (Order Filed on August 19, 1996).

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on July 28, 1997).

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on September 24, 1997).

JURISDICTION

The opinions and orders sought to be reviewed were entered on June 12, 1996, August 19, 1996, and July 28, 1997. Rehearing of the Tenth Circuit's (July 28, 1997) order was denied by order dated September 24, 1997.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the opinions and orders in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amend. 1, U.S. Consti.

Amend. 5, U.S. Consti.

28 U.S.C. § 455(a)

28 U.S.C. § 1291

10th Cir. R. 36.3.

Canon 3, ABA Code of Judicial Conduct

See the Appendix hereto for the full text of the pertinent portions of the constitutional provisions and statutes involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On June 12, 1996, the Tenth Circuit issued its order and judgment affirming the memorandum opinion and order issued by United States District Judge Edward W. Nottingham on January 17, 1995. In his opening brief on appeal, Mr. Smith made the following arguments:

> (1) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $4,541.25, and other harsh and unjustified sanctions, against Mr. Smith because of his and his client's refusal to sign the burdensome, oppressive and unconstitutionally overbroad confidentiality order proposed by opposing counsel;
>
> (2) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $1,870.93, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter;

(3) Judge Nottingham abused his discretion or otherwise acted improperly by refusing to recuse himself from the case pursuant to 28 U.S.C. § 455(a), where his impartiality might reasonably be questioned under all the circumstances of the case;

(4) Judge Nottingham abused his discretion or otherwise acted improperly by addressing Mr. Smith's client directly and accusing him of incompetence and unprofessional behavior in an attempt to induce or intimidate his client into firing him as her attorney, or to otherwise interfere with their attorney-client relationship;

(5) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $18,085.83, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing alleged "frivolous" appeals of his (Judge Nottingham's) immediately payable sanction orders;

(6) Judge Nottingham abused his discretion or otherwise acted improperly by applying D.C.COLO.LR 83.6P. (which is unconstitutional on its face) to stay Mr. Smith's client's civil rights case and to vacate her jury trial date "pending resolution of Plaintiff's counsel's status";

(7) Judge Nottingham abused his discretion or otherwise acted improperly by refusing to dismiss the case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition.

The Tenth Circuit issued its (June 12, 1996) order and judgment affirming Judge Nottingham's (January 17, 1995) memorandum opinion and order without addressing the arguments made by Mr. Smith in his opening brief on appeal or giving any reasons for its decision.

On August 19, 1996, Judge Nottingham issued his order requiring Mr. Smith "to pay the sanctions imposed in this case within ten days of the date of this order." This order was issued even though these sanctions had already been settled by the parties and their attorneys in a legally binding settlement agreement in which Mr. Smith had been released from payment of these sanctions to the opposing party as a part of the consideration for the settlement of the underlying case.

On July 28, 1997, the Tenth Circuit issued its order and judgment affirming Judge Nottingham's (August 19, 1996) order. In his opening brief on appeal, Mr. Smith made the following arguments:

(1) By issuing his orders imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Nottingham, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law;

(2) Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals;

(3) Because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its refusal to provide a statement of reasons (if any), addressing the issues raised and briefed by Mr. Smith on appeal, for its order and judgment affirming the orders issued by Judge Nottingham imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, the Tenth Circuit's fairness and impartiality might reasonably be questioned;

(4) The Tenth Circuit was therefore obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a);

(5) By failing or refusing to disqualify itself from this case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law;

(6) The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Nottingham, as to call for the exercise of the Supreme Court's power of supervision;

(7) Judge Nottingham committed reversible error, abused his discretion or otherwise acted contrary to the fair and impartial administration of justice by issuing his (August 19, 1996) order requiring Mr. Smith to pay the harsh and unjustified sanctions of approximately $25,000.00 previously imposed against him to the opposing party within ten days, even though these sanctions have already been settled by the parties and their attorneys in a legally binding settlement agreement in which Mr. Smith has been released from payment of these sanctions to the opposing party as a part of the consideration for the settlement of the underlying case;

> (8) Judge Nottingham has thus sadistically placed Mr. Smith in the untenable position of having to obey his transparently invalid order to pay these harsh and unjustified sanctions to the opposing party within ten days or run the risk of being cited for contempt or charged with a disciplinary violation.

The Tenth Circuit issued its (July 28, 1997) order and judgment affirming Judge Nottingham's (August 19, 1996) order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision.

On September 24, 1997, the Tenth Circuit issued its order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 28, 1997) order and judgment without addressing the arguments raised by him therein or giving any reasons for its decision.

II. ARGUMENT

By (1) issuing its (June 12, 1996) order and judgment affirming Judge Nottingham's (January 17, 1995) memorandum opinion and order without addressing the arguments made by Mr. Smith in his opening brief on appeal or giving any reasons for its decision, (2) issuing its (July 28, 1997) order and judgment affirming Judge Nottingham's (August 19, 1996) order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision, and (3) issuing its (September 24, 1997) order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 28, 1997) order and judgment without addressing the arguments

raised by him therein or giving any reasons for its decision, the Tenth Circuit has arbitrarily deprived Mr. Smith of his statutory right to appeal and receive a full and fair review of Judge Nottingham's final decisions imposing harsh and unjustified sanctions of approximately $25,000.00 against him, in violation of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law. See 28 U.S.C. § 1291 (which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court"); see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). These final decisions have resulted in irreparable harm to Mr. Smith, who has been suspended from the

practice of law since November 29, 1993, pending payment of more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado, including those imposed against him by Judge Nottingham. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Further, since Mr. Smith is financially unable to pay these harsh and unjustified sanctions, he is being indefinitely excluded from the practice of law on an impermissible basis, i.e., on the basis of his inability to pay harsh and unjustified sanctions of more than $50,000.00, in violation of his Fifth Amendment due process and equal protection rights. See, e.g., Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); Morris v. Schoonfield, 399 U.S. 508, 90 S.Ct. 2232, 26 L.Ed.2d 773 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); see also Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). Finally, since the unpublished sanction orders issued by Judge Nottingham are not judicial precedents under 10th Cir. R. 36.3. (which provides that "[u]npublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel"), the Tenth Circuit's reliance on this Court's opinion in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) to attempt to justify its issuance of unpublished orders and judgments refusing to vacate the unpublished sanction orders issued by Judge Nottingham was clearly erroneous and

contrary to law. This was especially true considering the devastating impact on Mr. Smith of the Tenth Circuit's refusal to vacate Judge Nottingham's unpublished sanction orders.

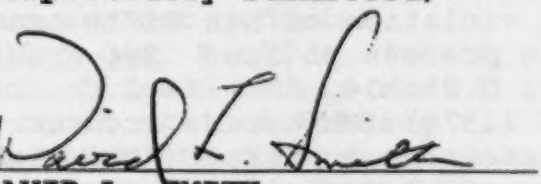
Under all the circumstances, the Tenth Circuit's fairness and impartiality might reasonably be questioned. The Tenth Circuit was therefore obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a) (which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned") and Canon 3 of the ABA Code of Judicial Conduct (which provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"). See also Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). By failing or refusing to disqualify itself from this case, the Tenth Circuit has deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due

process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). The Tenth Circuit has also so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's supervisory power; has decided important questions of federal law that have not been, but should be, settled by this Court; and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

III. CONCLUSION

Mr. Smith requests this Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances.

Respectfully submitted,



DAVID L. SMITH

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APPENDIX

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 95-1087 (10th Cir.) (Order and Judgment Filed on June 12, 1996). A-2

Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92 N 243 (U.S. District Judge Edward W. Nottingham) (Order Filed on August 19, 1996). A-5

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on July 28, 1997). A-6

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on September 24, 1997). A-9

Amend. 1, U.S. Consti. A-11

Amend. 5, U.S. Consti. A-12

28 U.S.C. § 455(a) A-13

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Canon 3, ABA Code of Judicial Conduct A-16

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[June 12, 1996]
	)	
Plaintiff,	)	
	)	
v.	)	No. 95-1087
	)	(D.C. No. 92-N-243
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	(D. Colo.)
	)	
Defendants-Appellees,	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[1]

Before BALDOCK, HOLLOWAY, and BRORBY, Circuit Judges.

[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Attorney-appellant David L. Smith appeals sanction orders entered against him by the district court and that court's refusal to vacate those orders following the parties' settlement of the underlying lawsuit. Plaintiff-appellant Geana J. Dunkin argues that the district judge should have recused, that he interfered with the attorney-client relationship, and that he abused his discretion when he stayed her case pending the resolution of her attorney's disciplinary status.

We have reviewed the record in this case and the briefs of the parties. We find that the district court was well within its discretion in imposing sanctions against Mr. Smith. Mr. Smith's argument that previous panels to this court were not frivolous has been foreclosed by previous panels of this court. See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994). Ms. Dunkin's arguments regarding the district court's refusal to recuse, its alleged interference with the attorney-client relationship, and its stay of her case became moot when the parties settled their underlying dispute.

Finally, the district court did not err in refusing to vacate the previously imposed sanctions. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S.Ct. 386, 393 (1994). This case does not present the exceptional circumstances which, in some instances, can support the vacatur of previous sanctions. See id.; see also Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444-45 (10th Cir. 1993).

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 92 N 243 [August 19, 1996]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER

This matter is before the court on the mandate of the United States Court of Appeals for the Tenth Circuit, filed in this court on August 19, 1996. The court of appeals affirmed this court's imposition of sanctions upon Attorney David L. Smith. In order to establish a date certain for payment of the sanctions, it is

ORDERED that Mr. Smith shall pay the sanctions imposed in this case within ten days of the date of this Order.

Dated this 19th day of August, 1996.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[July 28, 1997]
	)	
Plaintiff,	)	
	)	
v.	)	No. 96-1411
	)	(D.C. No. 92-N-243
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	(D. Colo.)
	)	
Defendants-Appellees,	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[2]

[2]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before KELLY and HENRY, Circuit Judges, and DOWNES,[3] District Judge.

After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

On receipt of this court's mandate arising from our affirmance of the district court's imposition of sanctions against Mr. Smith, see Dunkin v. Louisiana-Pacific Corp., No. 95-1087 (10th Cir. June 12, 1996), cert. denied, 117 S.Ct. 435 (1996), the district court entered an order establishing a date certain for payment of the sanctions. Mr. Smith appeals from that order, but does not raise any issues relating to that order per se. Instead, he raises arguments against the imposition of sanctions that he raised in the prior appeal. He also has moved for this court's recusal from this matter and for en banc consideration of recusal. These motions were denied in orders filed on November 29 and December 27, 1996. Consideration of the remaining issues is barred by law of the case. See Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1183 (10th Cir. 1995).

AFFIRMED.

---

[3]The Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[September 24, 1997]
Plaintiff,	)	
v.	)	No. 96-1411
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	
Defendants-Appellees,	)	
DAVID L. SMITH,	)	
Attorney-Appellant.	)	

ORDER
Filed September 24, 1997

Before KELLY and HENRY, Circuit Judges, and DOWNES,[4] District Judge.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

---

[4]The Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by:
Deputy Clerk

Amendment I of the Constitution of the United States provides in pertinent part as follows:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in pertinent part as follows:

> **No person shall . . . be deprived of life, liberty, or property, without due process of law.**

28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

10th Cir. R. 36.3. provides as follows:

> Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. Citation of unpublished orders and judgments is not favored. Nevertheless, an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition. A copy of the decision must be attached to the brief or other document in which it is cited, or, if cited in oral argument, provided to the court and all other parties.

Canon 3 of the ABA Code of Judicial Conduct provides in relevant part as follows:

. . .

> **A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . .**

(2)

FILED

97 1033 DEC 15 1997

No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

38 pp

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243 [July 16, 1992]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER

The court heard numerous discovery disputes in this matter on Thursday, July 9, 1992, and Thursday, July 16, 1992. I have considered the evidence and arguments of counsel. I have also carefully reviewed the file in this matter. On the basis of that review, I have heretofore entered certain oral findings and conclusions from the bench. On the basis of those findings and conclusions, it is

ORDERED as follows:

. . .

10. Pursuant to rules 26 and 37 of the Federal Rules of Civil Procedure, plaintiff's counsel, David L. Smith, will, on or before July 27, 1992, pay defendants the sum of $4,541.25 as a reasonable attorney fee in connection with defendants' filing of the motions for protective orders. This sum consists of the $4,060 documented in

" Defendants' Motion for Approval of Attorneys' Fees with Affidavit" filed July 13, 1992, plus an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time).

Dated this 16th day of July, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	[December 10, 1992]	
Plaintiff,	)	
v.	)	92 N 243
LOUISIANA-PACIFIC CORPORATION,	)	
Defendant.	)	

HEARING - DISCOVERY DISPUTES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 7:10 a.m. on the 10th day of December, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff: David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant: Cecil R. Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

P R O C E E D I N G S

. . .

THE COURT: The Court finds that the firm of Harding and Ogborn has or will bill Louisiana-Pacific $1,807.93 in connection with the motion for reconsideration on which I had previously indicated that I would award attorneys fees.

I find, based on the testimony and all the evidence and the file, that the amount of time expended was reasonable and necessary in the circumstances of this case.

Accordingly, Louisiana-Pacific is awarded attorneys fees on this matter of $1,807.93. And I should clarify it by saying that's attorneys fees plus the costs of ordering the transcript that the plaintiff should have ordered in the first place to perfect the record on appeal. That amount has previously, as I recall, been awarded against the plaintiff's attorney based on the previous record. And I gave the plaintiff full opportunity to indicate whether the amount should be awarded against plaintiff or her attorney, and based on the record, that's the best I can do. That amount will be paid by plaintiff's counsel no later than December 17th– I'm sorry– December 16th, 1992.

MR. SMTTH: Will the Court grant a stay of execution pending appeal?

THE COURT: No.

. . .

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 3, 1993

Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	[July 29, 1992]	
Plaintiff,	)	
v.	)	92 N 243
LOUISIANA-PACIFIC CORPORATION,	)	
Defendant.	)	

HEARING - MOTIONS
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:08 a.m. on the 29th day of July, 1993, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff: David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant: Cecil R. Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Starr Kelso, Esq.
Sims, Leische, Newell,
Kelso, Wallace, P.A.
1044 Northwest Boulevard
Coeur d'Alene, Idaho
83814

Greg R. Tichy, Esq.
15407 E. Mission, #425
Veradale, Washington
99037

P R O C E E D I N G S

. . .

THE COURT: Now, Ms. Dunkin, let me address you directly. This case is going to be tried and/or disposed of on its merits. I think that you are being very ill served by your attorney, Mr. Smith, and I want to advise you of that on the record. You've chosen this attorney and it's my view that he is not competently representing you.

If you wish to have the Court appoint an attorney or if you wish to retain another attorney, I will permit that. You are entitled to the appointment--well, you're not entitled, but the Court is willing to appoint an attorney under the provisions of Tenth Circuit case law to represent you in this case. It is your choice, and if you choose to proceed with Mr. Smith, you won't be in a position later on to complain to the Court that your case was not properly tried.

Do you understand that?

MS. DUNKIN: (No audible response.)

THE COURT: I didn't hear you.

MS. DUNKIN: Yes.

THE COURT: All right. Court's in recess.

(Whereupon, at 6:37 a.m., the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

August 12, 1993

Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	[February 17, 1994]	
Plaintiff,	)	
v.	)	92 N 243
LOUISIANA-PACIFIC CORPORATION,	)	
Defendant.	)	

HEARING - AWARD OF ATTORNEYS FEES AND PRETRIAL CONFERENCE TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:11 a.m. on the 17th day of February, 1994, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For David Smith, Esq.: Phillip Figa, Esq.
5251 DTC Parkway
Englewood, Colorado

For the Defendants: Cecil R. Hedger, Esq.
Harding & Ogborn
1200 - 17th Street,
#1000
Denver, Colorado
80202

P R O C E E D I N G S

. . .

THE COURT: . . . So I'm going to award--I'm not going to award double fees because I don't think that's appropriate in this case, and I doubt also that the statute really reads that way, or the rule, Federal Rule 38. It says fees and double costs. And I'm going to award attorney fees for pursuing the frivolous appeal--let me back up a second and say one other thing.

On the split of authority among the circuits, as I said in colloquy with counsel, there's a way to handle that, and it wasn't handled that way in this case. In any event, whether there's been a stay with Justice Ginsberg or a request for a stay, and whether there are other circuits that decide the matter to the contrary, I'm in the Tenth Circuit. The Tenth Circuit has pretty clearly given me my marching orders in the order that it filed on February 11, 1993. So, I'm not going to resolve any alleged split in the circuit, although I'll say for the record that in this instance, I think the Tenth Circuit's position is the only reasonable one, and this case is the prime illustration of it.

If Mr. Smith could make a mockery of these proceedings by turning the circus into the side show by the collateral litigation that he has generated in this case, then there would be no justice in this case. So I'm awarding fees in the amount of $17,506.50. I'm awarding costs in the amount of $579.33.

Now, have the fees and costs from my previous sanctions been paid yet, Mr. Hedger?

MR. HEDGER: No, they have not, Your Honor.

THE COURT: Well, I'll reorder them paid in the for what it's worth category. How an attorney of law can continue to defy the authority of courts is just beyond me.

Court's in recess.

. . .

February 23, 1994

Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243 [February 21, 1994]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

MINUTE ORDER

EDWARD W. NOTTINGHAM, Judge
Betsy T. Ellis, Secretary

February 21, 1994

Pursuant to the court's ruling in open court on February 17, 1994, this matter is stayed pending resolution of the status of plaintiff's counsel. The dates for the trial and trial preparation conference, however, will hold on the court's calendar.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,		[March 4, 1994]
Plaintiff,	)	
v.	)	92 N 243
LOUISIANA-PACIFIC CORPORATION,	)	
Defendant.	)	

TRIAL PREPARATION CONFERENCE
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 2:50 p.m. on the 4th day of March, 1994, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff: David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant: Cecil R. Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Greg R. Tichy, Esq.
15407 E. Mission, #425
Veradale, Washington
99037

P R O C E E D I N G S

. . .

THE COURT: All right, the matter is here for a trial preparation conference.

Mr. Smith, can you give us, without revealing anything that you shouldn't be revealing, give us any guess as to when the matter will be resolved so that we'll know whether you're in or out of this case?

MR. SMITH: No, Your Honor, I have no further information.

THE COURT: Well, I can't continue, you know, to hold that trial date open. What's your position? I mean, you can't continue at this point, can you? You can't even sign a final pretrial order, or you haven't so far.

MR. SMITH: I would ask for permission to sign at this point. There's been no ruling by a court one way or another as to what my status is, and all I have are some allegations.

THE COURT: And you haven't paid any of the money yet; right?

MR. SMITH: You're speaking of the sanctions in this case?

THE COURT: Right. Well, this case or any other case.

MR. SMITH: No, Your Honor, I am unable to pay any sanctions.

THE COURT: All right. This trial is continued.

Mr. Hedger, I'm assuming that Louisiana-Pacific doesn't object to that. I mean, obviously at some point, the work that you've put into it will come to fruition.

MR. HEDGER: Your Honor, Louisiana-Pacific is not going to interpose an objection to the continuance of this matter, but only to note and remind the Court that on July the 29th of 1993, this Court was very direct in a personal conversation with Ms. Dunkin--

THE COURT: Right.

MR. HEDGER: --and advised her of her need to obtain new counsel. We are now in the position, Your Honor, of having certain of our witnesses who are retired, and it's getting difficult to round them up and make schedules. We would be most desirous of working with the Court in terms of setting an appropriate schedule.

I don't know yet, the Court set this matter for a three day trial and Mr. Smith, in his position in the pretrial order that he's now represented after four months he's willing to sign, thinks this case is going to be a five day trial. And there's a couple of other type of housekeeping issues that need to be addressed at some point. It doesn't necessarily have to be today, Your Honor.

THE COURT: All right. The Tenth Circuit was pretty clear. I can't understand what our disciplinary committee is having such a problem with. But they work on their own schedule and they work on a volunteer basis. So the matter is continued and as soon as Mr. Smith's status is resolved, we'll figure out where it goes.

And I intend to brook no further delay, because Ms. Dunkin's been warned clearly. She used to attend these conferences. Where is she, Mr. Smith?

MR. SMITH: She's in school, Your Honor.

THE COURT: I see.

. . .

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

March 21, 1994

Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243 [March 6, 1994]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

MINUTE ORDER

EDWARD W. NOTTINGHAM, Judge
Betsy T. Ellis, Secretary

March 6, 1994

Pursuant to the court's ruling in open court on March 4, 1994, the trial date of March 28, 1994, is hereby VACATED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243 [January 17, 1995]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

MEMORANDUM OPINION AND ORDER

NOTTINGHAM, Judge

This matter, an action arising partly under various federal and state statutes and alleging illegal discrimination in the terms and conditions of employment, is now before the court on the " Stipulation of Dismissal With Prejudice" filed by all parties on January 6, 1995. The parties have apparently resolved their disputes. A part of the resolution is that defendants will not try to enforce or collect--and plaintiff's counsel, David L. Smith, will not have to pay--certain monetary sanctions imposed on him by this court and the United States Court of Appeals for the Tenth Circuit. The parties have evidently signed an agreement to this effect. All of this is unremarkable and causes the court little concern. The sanctions in question consisted mainly of orders that Mr. Smith pay defendants' attorney fees and costs incurred as a result of numerous discovery disputes in the case. The orders having been

entered partly to compensate defendants, I can think of no public policy which would prohibit defendants from bargaining away their right to such compensation.

There is more, however. The parties want this court not only to dismiss the case, but also to incorporate the parties' agreement, by reference, and to make it an order of the court. The agreement, as quoted in the parties' stipulation, provides for the " vacation and dismissal" of all monetary sanctions against Mr. Smith " nunc pro tunc to the date of their imposition by the United States District Court for the District of Colorado and/or the United States Court of Appeals for the Tenth Circuit." It thus appears that the parties expect this court to vacate all sanction orders in the case, including those entered by the court of appeals. The " nunc pro tunc" language underscores their intent to nullify all sanction orders--to pretend that they were never really entered.

I decline the parties' invitation to incorporate such a stipulation as the order of this court. Setting to one side the conceptual problem presented by the proposal that I vacate an order entered by the court of appeals (something which I believe to be beyond this court's jurisdiction), I decline on other grounds as well. I think the case analogous to U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 63 U.S.L.W. 4005 (1994), in which the United States Supreme Court held that settlement of a case on appeal does not ordinarily entitle the parties to an order vacating the lower court judgment which is the subject of the appeal, even if the parties have bargained for such an order. The sanction orders entered by this court and court of appeals in this case

reflect serious abuse of the discovery process by plaintiff's counsel. As I observed during one of the many discovery hearings occasioned by counsel's behavior, such abuse, if undertaken by any significant number of lawyers, would bring civil litigation to a halt. The public generally, and particularly those members of the public who use civil litigation to resolve their disputes, have a stake in conserving judicial resources by protecting the litigation process against such abuse. The sanction orders were intended not only to compensate defendants, but also to vindicate the public interest by discouraging such abuse as occurred here. While the parties may bargain away the benefits they receive under such orders, they are not entitled to bargain away the public interest by demanding that the court vacate the orders.

I mentioned earlier that the sanction orders at issue consisted "mainly" of monetary sanctions against plaintiff's counsel. The exception is the court of appeals' order suspending plaintiff's counsel from practicing law before that court and suggesting that the court might consider reinstatement if counsel paid the monetary sanctions imposed in this and other cases. It is this order which illustrates most vividly why the parties' request for vacatur is inappropriate in these circumstances. The court of appeals' order is premised on concerns which go beyond this case and the parties thereto. It is disciplinary in nature and reflects a judgment about Mr. Smith's conduct as counsel in this and other cases. It will be for the court of appeals to decide, if and when Mr. Smith applies for reinstatement, whether the settlement negotiated in this case constitutes compliance with the court's condition

requiring him to demonstrate " that each sanction order of . . . the district court has been satisfied." I will not accede to Mr. Smith's apparent attempt to bolster a prospective attempt at reinstatement by vacating the order imposing monetary sanctions in this case.

Upon the foregoing findings and conclusions, it is

ORDERED as follows:

1. The case is dismissed with prejudice, each party to bear his, her, or its own costs.

2. Contrary to the parties' stipulation, this order does not vacate any order heretofore entered in this case.

Dated this 17th day of January, 1995.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28
[February 10, 1995]

IN THE MATTER OF DAVID L. SMITH

DISCIPLINARY ORDER

On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney

admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL
OF THE COURT:

_____
ZITA L. WEINSHIENK, Judge

_____
EDWARD W. NOTTINGHAM, Judge

_____
DANIEL B. SPARR, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

VICKI L. SEALES,	)	[April 12, 1995]
	)	
Plaintiff,	)	
	)	
v.	)	95 N 189
	)	
JEFFERSON COUNTY SCHOOL DISTRICT R-1, et al.,	)	
	)	
Defendants.	)	

STATUS CONFERENCE
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge, for the District of Colorado, beginning at 8:11 a.m. on the 12th day of April, 1995, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For Jefferson County
School District:

Allen P. Taggart, Esq.
Caplan & Earnest
2595 Canyon Boulevard, #400
Boulder, Colorado 80302

For Public Employees'
Retirement Association:

John Husband, Esq.
Holland & Hart
555 17th Street
P.O. Box 8749
Denver, Colorado 80201

For CIGNA Healthcare:

Gerald D. Pratt, Esq.
Mann & Shappell
4582 South Ulster Street
Stanford Place 3,#906
Denver, Colorado 80237

P R O C E E D I N G S

THE COURT: Case 95-N-189, Seales v. Jefferson County School District, R-1, et al.

I'll take the appearances of people who are here today. I take it, Ms. Seales is here?

MR. SMITH: Yes, Your Honor. I'm David Smith, attorney for plaintiff, Vicki Seales, who is appearing with me here in Court this morning.

THE COURT: All right. Whether you are attorney for the plaintiff remains to be seen.

MR. TAGGART: Your Honor, Allen Taggart representing Jefferson County School District.

MR. PRATT: Your Honor, I'm Gerald Pratt representing CIGNA Healthcare of Colorado.

MR. HUSBAND: And, John Husband, the Public Employees' Retirement Association, Your Honor.

THE COURT: Mr. Smith, you have been suspended by the disciplinary panel of this Court, as I understand it. And, therefore, your purporting to represent Ms. Seales in this case is a violation of law. I'm going to ask you not to be at the bar of this Court, but rather to take a seat in the spectator section of the courtroom.

MR. SMITH: Thank you, Your Honor.

THE COURT: Ms. Seales, I need to address you directly. I don't know how much Mr. Smith has informed you about what's going

on, but he has been suspended by this Court from the practice of law. And, therefore, you need to do one of tow things. Either you need to prepare to represent yourself which is for many reasons not a good idea and it has nothing to do with your ability; it has to do with the fact that these are complicated legal proceedings. The other side is represented by experienced attorneys and you need to have an experienced attorney on your side to help you prepare your case.

I'm going to give you time to find that experienced attorney. There are a number of sources that you can go to. The Metropolitan Lawyer Referral Service is one of them. There may be others that I'm not even aware of, but that's something that you need to do in order to present your case well. If you don't get an experienced attorney or an attorney, I should say--I'm not saying it has to be an attorney of any particular experience, but you do need an attorney. And, if you don't get one, then you're going to have to pursue the case yourself which is your entitlement. You're entitled, if you can't find an attorney and still want to pursue your case, to pursue the case as a pro se plaintiff representing yourself. If that's done, the Court will not be in a position to give you legal advice nor will I be able to sort of help you out to try to even up the scales because there are attorneys on the other side. It would be unfair for the other side for the Court to be involved in giving you legal advice or trying to help you out because you're representing yourself.

So, you need to make a decision on that matter and what I'm going to do is order that within the next 30 days you should obtain an attorney should enter his or her appearance

in the case. At the end of 30 days, if you don't have an attorney, you need to file with just a status report that says I either don't want to get an attorney or I haven't been able to get an attorney or whatever the situation is. And, at that point, the case needs to move forward either with your new lawyer or with you, yourself. If you don't move forward and don't participate in moving it forward, it's eventually going to be dismissed for failure to prosecute it or move it forward.

Are there any questions that you want to ask the Court?

MS. SEALES: No, I have no questions.

THE COURT: All right, very well.

Now, Mr. Smith, since your suspended, you should no longer be advising this lady in terms of giving her legal advice. That just is improper.

MR. SMITH: Does the Court wish me to respond?

THE COURT: No, I don't. But, it's going to be the order of the Court in this case that Mr. Smith no longer be involved in giving legal advice to this plaintiff or in any way, directly or indirectly, practicing law in this Court. That is a court order, Mr. Smith.

MR. SMITH: Your Honor, not by way of response, but by way of inquiry, would the Court be willing to certify that decision for appeal to the 10th Circuit?

THE COURT: Surely.

MR. SMITH: All right.

THE COURT: I mean, it depends on what I'm certifying. I'm not going to certify that it's an appeal that has a scintilla of merit.

MR. SMITH: Well, the Court is aware of the 10th Circuit's views on interlocutory appeals. I don't know what view the 10th Circuit would take of an appeal of this type, but I would ask that the Court certify that decision so that an appeal can be taken to this decision which I believe interferes seriously with the plaintiff's right to representation in this case.

THE COURT: Are you talking about a certified appeal under 28 U.S.C. 1292--

MR. SMITH: Yes.

THE COURT: --where I certify an--

MR. SMITH: Yes, Your Honor.

THE COURT: Well, I'm not going to do that.

MR. SMITH: The point is that the plaintiff is in no position to move forward with this case one way or another without counsel. She has advised me that she does not have the means or, frankly, the inclination to hire other counsel. So, she is in a position where she really cannot do anything.

THE COURT: To certify an appeal, I have to find that the order that I've entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation. I can't make any of those findings. I don't think an immediate appeal of this order would affect the advancement of the litigation one way or another.

MR. SMITH: Your Honor, as the Court is aware--

THE COURT: I don't think that there is--I don't think there is a substantial ground for difference of opinion. You are a suspended lawyer. It just flabbergasts me, sir, that you are saying that a Court which prohibits a suspended lawyer from practicing in front of it is thereby interfering with his client's rights.

MR. SMITH: Your Honor--

THE COURT: Ms. Seales, there are lots of lawyers out there who will take your case and do a good job for you if you have a good case. You are not required in any way, shape, or form to be with Mr. Smith. He's been suspended, and it's going to prejudice your case if you continue on with him because you're not going to be able to do it in this court. It's that simple.

MR. SMITH: Your Honor as you're aware, you're on the disciplinary committee that imposed this suspension, and as you're aware, there's a motion for reconsideration pending in front of that committee. There is a motion for stay alleging and--

THE COURT: Mr. Smith, let me interrupt you. I am not going to reveal anything that went on in that disciplinary committee because those proceedings are confidential. If you choose to spread it on the street or

make it public, that is your business. But, my obligation as a disciplinary panel member is to maintain those proceedings confidential.

MR. SMITH: Your Honor, the confidentiality has been waived repeatedly and there's been newspaper coverage.

THE COURT: All right.

MR. SMITH: The 10th Circuit has issued a published opinion. There's no secrecy to these proceedings.

THE COURT: Mr. Smith, I'm really not going to argue with you any more. I think I've made my position clear.

Ms. Seales, if you have any questions, at all, please don't hesitate to ask me. I'll be glad to answer them. I have no criticism of you. But, I am not going to allow Mr. Smith to be your attorney in this case.

MR. SMITH: Your Honor, the plaintiff needs representation to make this decision.

THE COURT: And, she shall have--she'll have representation, Mr. Smith. It just won't be by you. Now, sit down or I'll call the Marshall.

Does any defendant have anything that they need to take up today, this being a status conference?

MR. TAGGART: Your Honor, I assume that as a result of your order, the proceedings are stayed. There is a settlement conference scheduled for Friday and I assume the Magistrate Judge will be contacted?

THE COURT: I think you ought to do that yourself to make sure that the Magistrate Judge knows what's going on. Which Magistrate Judge is it?

MR. TAGGART: Schlatter.

THE COURT: There's really no purpose--I assume there's no purpose to a settlement conference.

MR. TAGGART: No, Your Honor.

THE COURT: All right. I'll contact him, but you should be sure to do the same thing just so that nothing falls through the cracks.

MR. PRATT: Your Honor, Jerry Pratt for CIGNA Healthcare of Colorado. Should we then consider the other dates that have been scheduled as stayed?

THE COURT: Yes. All scheduling in this case is vacated and/or stayed. We're just going to have to enter some new scheduling orders in the next 30 to 45 days.

And then, Ms. Seales, you have to file whatever you file at the end of the 30 days. Your attorney files and enters appearance which he or she will know how to do. If you don't have an attorney, you have to file a paper with the Clerk of the Court downstairs in Room 145 and just let me know what the situation is.

MS. SEALES: Okay.

THE COURT: All right. Court's in recess.

(Whereupon, at 8:17 a.m., the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

April 17, 1995

Federal Reporting Service, Inc.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 92 N 243 [August 19, 1996]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER

This matter is before the court on the mandate of the United States Court of Appeals for the Tenth Circuit, filed in this court on August 19, 1996. The court of appeals affirmed this court's imposition of sanctions upon Attorney David L. Smith. In order to establish a date certain for payment of the sanctions, it is

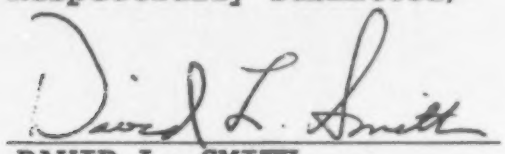
ORDERED that Mr. Smith shall pay the sanctions imposed in this case within ten days of the date of this Order.

Dated this 19th day of August, 1996.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

Respectfully submitted,



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